FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 3 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 983

HAROLD GROSS, ALSO KNOWN AS HARRY GROSS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

DONALD N. MURTHA,
1009 Tower Bldg.,
Washington, D.C.,
JOSEPH J. BALLIRO,
Attorneys for Petitioner.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and constitutional provisions	2
Statement of the matter involved	2
Reasons for granting the writ	4
Conclusion	7
Appendix A	8
Excerpt from the opinion of the United States Court of Appeals for the Second Circuit	8
Appendix B	13

Table of Authorities Cited.

Cases.

United States v. Albanese, 224 F. 2d 879; cert. den. 350 U.S. 845	5, 6
United States v. Bink, 74 F. Supp. 603	4
United States v. Gillette, 189 F. 2d 449; cert. den. 342 U.S. 879; reh. den. 345 U.S. 945	6
United States v. Miller, 246 F. 2d 486; cert. den. 355 U.S. 905	5, 6

Statutes, Etc.

U.S. Constitution, Amendment 6	2
Internal Revenue Code of 1939, sec. 145(b)	3
Internal Revenue Code of 1954, sec. 7201	3
18 U.S.C. 3237	2
28 U.S.C. 1254(1)	2
Federal Rules of Criminal Procedure, Rule 29	3
Federal Rules of Criminal Procedure, Rule 34	3

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

HAROLD GROSS, ALSO KNOWN AS HARRY GROSS,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, Harold Gross, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 6, 1960.

Opinions Below.

There was no opinion in the District Court. The opinion of the Court of Appeals (Lumbard, Friendly and Moore, Circuit Judges) has not yet been reported. A copy of the pertinent portion of the slip opinion is affixed hereto as Appendix A.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 6, 1960 (*infra*, Appendix B). A motion to recall the mandate was denied on May 5, 1960.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

Question Presented.

Whether the Government established that venue was properly laid in the Southern District of New York.

Statutes and Constitutional Provisions.

18 U.S.C. 3237, providing that "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed."

U.S. Constitution, Amendment 6, providing that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . ."

Statement of the Matter Involved.

In an indictment, in six counts, the defendant was charged with attempting to evade his income taxes for each of the years 1953 through 1958 by preparing and causing to be prepared and by filing and causing to be

filed returns which understated his true income, in violation of section 145(b) of the Internal Revenue Code of 1939 as to 1953 and of section 7201 of the Internal Revenue Code of 1954 as to the later years.

At the conclusion of the evidence the defendant moved for a directed verdict of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. Thereafter defendant renewed his motion for acquittal "on the ground that the evidence is insufficient to sustain a conviction of the offenses charged," for arrest of judgment under Rule 34 of the Federal Rules of Criminal Procedure "on the ground that the Court is without jurisdiction of the offense in that the offenses, and each of them, if any, were not committed in this district." Both motions were denied.

The Court of Appeals reversed the conviction of petitioner because of improper questions allowed to be asked him on cross-examination, and ordered a new trial. The Court of Appeals, however, did not sustain petitioner's claim that venue was improper, and ruled that venue was properly laid in the Southern District of New York.

The Government claimed that the defendant, in the years in issue, had received six annual payments of $4000 in cash and two cash payments of $2500 each, and failed to record them on his tax returns. The alleged cash payments were not made in the Southern District of New York. Until the fall of 1958 the defendant lived in the Eastern District of New York and the returns for 1953-1957 were filed in the Eastern District of New York. In October, 1958, the defendant moved to Miami Beach and his 1958 return was filed in Florida.

The defendant denied receiving the cash payments. He does admit requesting an accountant, with offices in the Southern District of New York, to prepare his income tax returns for the years in issue. In each of the years the defendant submitted to his accountant his W-2 forms as

representing all of his income. The accountant prepared the returns in his own handwriting, signed them under the rubric "Preparer" (except for the 1953 return), and mailed them to the defendant, who signed and filed them without change.

There was no other evidence of acts occurring in the Southern District of New York.

Reasons for Granting the Writ.

Proper venue is an absolute right of the defendant in a criminal case, which is safeguarded by the Constitution. This right is of a jurisdictional nature, and a Court cannot obtain jurisdiction when there is no basis for proper venue. These principles were clearly enunciated by Judge James Alger Fee in *United States* v. *Bink*, 74 F. Supp. 603, 612 (Ore. 1947), where Judge Fee said:

> "It will be noted that the constitutional proxisions build into the structure of the federal courts the proposition that indictment and trial must be in the state and district where the act was committed. The statute above referred to which gives jurisdiction over crimes to the district courts could not, subject to the constitutional limits just quoted, have conferred power upon a district court to hear and determine a charge of crime in another state and district.
>
> "It has thus been established by the foregoing that the constitution forbids indictment, trial and judgment in a criminal case in any state and district except where the crime was committed. The matter is of jurisdictional structure of the particular court."

A typical example of the nature of facts required to be proved in the establishment of venue was developed in

the trial of a case decided by the Court of Appeals for this circuit: *United States* v. *Albanese*, 224 F. 2d 879 (2d Cir.); cert. den. 350 U.S. 845 (1955). The facts in the *Albanese* case indicated that the defendant was the owner of a "profitable truck-loading business at several piers along the Manhattan waterfront" (in the Southern District). False and fictitious records were made and kept (in the Southern District) to disguise the defendant's true income. False payroll records were kept (in the Southern District) listing the defendant as a "dock worker" instead of owner of the business.

It is apparent that the defendant did everything (except the filing of his return) in the Southern District of New York.

In answer to the defendant's contention in the *Albanese* case that the Court did not have venue, the Court said:

> ". . . the defendant's entire course of action in the Southern District of New York (italics added), from preparing false records to the mailing of false returns, came within the ambit of the 'attempts' statute, and venue was thus proper."

The Circuit Court for this district in the case of *United States* v. *Miller*, 246 F. 2d 486 (2d Cir. 1957); cert. den. 355 U.S. 905 (1957), once again established that substantive actions by a defendant in the Southern District gave that Court venue. In the *Miller* case the defendant prepared, signed and mailed letters, in the Southern District, containing false statements, to the Fiscal Service of the Treasury Department in Washington, D.C. Miller's entire course of action took place in the Southern District.

If Miller had done nothing in the Southern District of New York except pay a public stenographer to type the false statements, we would then have an analogy to the

instant case. We are reluctant to "presume" what this Court would have done if the latter facts were present in the *Miller* case, but, by way of analogy, we respectfully suggest that this Court would not have been satisfied that payment for typing would be sufficient to establish venue.

For there to be a conviction on the counts of this indictment there must be proof upon which a jury could base a finding that the acts occurred in the Southern District of New York, and the jury must have been so instructed. *United States* v. *Gillette*, 189 F. 2d 449, 452 (2d Cir. 1951); cert. den. 342 U.S. 879; reh. den. 345 U.S. 945.

In view of the record disclosing that all the defendant did, in the instant case, was to furnish information for the return to an accountant in the Southern District and pay him for preparing the return, it would seem to be the Government's contention that "any act" in the Southern District gives that Court jurisdiction and venue is proper. We suggest that it is not unreasonable to show by example how ludicrous that contention is.

Suppose the accountant prepared only one-half the return in the Southern District, or carried it with him into several districts, preparing part of it in each district, and receiving payment in another district. It is common knowledge that thousands of individuals and concerns from all parts of the country send the information to prepare their returns and pay for the preparation of the returns to accountants located in larger cities in different districts. It is absurd to suggest that the mere physical, mechanical act of preparation and payment is sufficient to establish venue and jurisdiction.

We adopt the interpretation of what is required as it was expressed by Judge Kaufman in *United States* v. *Albanese*, 224 F. 2d 879 (2d Cir.); cert. den. 350 U.S. 845 (1955), wherein he stated:

"'. . . it is clear that the preparation of the returns and the 'causing' to be prepared (which would include the details and affirmative acts surrounding the causation) occurred in the Southern District of New York."

In the instant case it was not established that there was any "affirmative" action surrounding the mere physical preparation of the defendant's income tax return.

Conclusion.

The writ of certiorari should be granted.

Respectfully submitted,

DONALD N. MURTHA,

JOSEPH J. BALLIRO.

Appendix A.

EXCERPT FROM THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

(Argued March 4, 1960; decided April 6, 1960.)

Because of the issue of venue raised by Gross on this appeal, it becomes necessary to state how his tax returns were prepared and filed. In 1952 Gross requested Michael Pinto, an accountant having an office in the Southern District of New York, to prepare his income tax returns for 1951. Pinto asked for documentary evidence of Gross' income. Gross submitted his W-2 forms. Pinto could not recall whether Gross had submitted any other documents but "was satisfied that he submitted to me all the income that he had to report." For each of the years here in question, Pinto received similar information from Gross in Pinto's office in the Southern District. Pinto there prepared the returns in his own handwriting, signed them under the rubric "Preparer" (except for the 1953 return), and mailed them to Gross, who signed and filed them without change. Until the fall of 1958 Gross lived in Forest Hills, L. I., and the returns for 1953-1957 were filed in the Eastern District of New York; in October, 1958, he moved to Miami Beach and his 1958 return was filed in Florida. After Pinto had prepared the returns and sent them to Gross, "a truckdriver or somebody who seemed to look like a truckdriver" would come to Pinto's office with Pinto's fee. The government does not claim Pinto knew of Gross' alleged tax evasion.

After both sides had rested, defendant moved for a directed verdict of acquittal under Fed. R. Crim. Proc. 29. The Court reserved decision. The jury found defendant guilty on all counts. Thereafter defendant renewed his motion for acquittal "on the ground that the evidence is

insufficient to sustain a conviction of the offense charged," for arrest of judgment under Fed. R. Crim. Proc. 34 "on the ground that the court is without jurisdiction of the offense in that the offenses, and each of them, if any, were not committed in this district," and for a new trial under Fed. R. Crim. Proc. 33. All motions were denied. The court sentenced Gross to five years' imprisonment on each count, the sentences to run concurrently.

Gross contends the District Court erred in not granting his motions for acquittal and for arrest of judgment on the ground of improper venue; the government answers, *first*, that Gross waived any objection to venue and, *second*, that venue was properly laid in the Southern District in any event. We overrule the government's answer as to waiver but sustain its answer on the merits. Gross contends in the alternative that a new trial should be directed because of certain questions allowed to be asked him on cross-examination, and also because of what he claims to have been an improper answer by the Court to a question from the jury after the jury had begun its deliberations. We uphold the former contention and therefore do not reach the second.

We shall deal first with the government's claim that Gross waived any objection to venue in the Southern District by his delay in making this.

The claim would be well founded if this were a civil case, where the privilege as to venue "is of such a nature that it must be asserted at latest before the expiration of the period allotted for entering a general appearance and challenging the merits." *Commercial Casualty Ins. Co.* v. *Consolidated Stone Co.*, 278 U. S. 177, 179-80 (1929). However, no similar time limitation on the making of the objection exists in criminal cases where questions of venue "are not merely matters of formal legal procedure," *United States* v. *Johnson*, 323 U. S. 273, 276 (1944), but of con-

stitutional right. As said by Judge Minton, as he then was, in *United States* v. *Jones*, 174 F. 2d 746, 748 (7th Cir. 1949), "One of the things the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it, there can be no conviction. U. S. Const. Amend. VI * * *," and further a "motion for acquittal made at the conclusion of all the evidence properly raised the question of venue." *Accord, United States* v. *Browne*, 225 F. 2d 751, 755 (7th Cir. 1955).

The bundle of legal principles grouped under the term "waiver" thus has an exceedingly narrow application when a criminal defendant claims the government has failed to prove proper venue. Indeed, our opinions show rather that this is limited to what would be more accurately described as election, *i.e.*, to cases where the conduct of a defendant who has been put on notice that the government will not prove proper venue in the district of the indictment indicates that he is nevertheless willing to be tried there. We have found such an indication where lack of proper venue appeared on the face of the indictment (*United States* v. *Jones*, 162 F. 2d 72 (2d Cir. 1947)), and have said we might find it where lack of intention to prove proper venue appeared from statements by the government during the trial, see *United States* v. *Michelson*, 165 F. 2d 732, 734 (2d Cir.), *aff'd.*, 335 U. S. 469 (1948), or where defendant specified the grounds for a motion for acquittal but omitted mention of improper venue, see *United States* v. *Brothman*, 191 F. 2d 70, 73 (1951).

This was not such a case. The various counts of the indictment charged that "in the Southern District of New York, Harold Gross * * * did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America * * * by preparing and causing to be prepared and by filing and causing to be filed with the District Di-

rector of Internal Revenue at Brooklyn, New York [or in Count VI, at Jacksonville, Florida], a false and fraudulent joint income tax return * * * " Since the indictment alleged that the returns had not only been prepared in but filed from the Southern District, there was no basis for Gross' moving against it for improper venue, *United States* v. *Albanese*, 224 F. 2d 879 (2d Cir.), *cert. denied* 350 U. S. 845 (1955); he was entitled to await the government's case and to move when the government failed to prove that all the elements charged to have taken place in the Southern District in fact occurred there. *United States* v. *Michelson, supra; United States* v. *Brothman, supra.*

The government supports venue in the Southern District under 18 U. S. C. §3237, providing that "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." It relies on *United States* v. *Albanese, supra,* and *United States* v. *Miller,* 246 F. 2d 486 (2d Cir.), *cert. denied* 355 U. S. 905 (1957), where venue was sustained under that section. Neither is decisive here. In *Albanese,* an income tax evasion case, everything save the actual receipt of the returns took place in the district where the defendants were charged; and in *Miller,* a false statement prosecution, the statements were made up and mailed in the district of the indictment, and only the receipt was elsewhere. Here, on the contrary, there was no evidence that Gross filed the returns from a place in the Southern District.

Nevertheless we believe venue was properly laid in that district. "By utilizing the doctrine of a continuing offense, Congress may * * * provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates." *United States* v. *Johnson,*

supra, at 275. The intent of Congress to avail itself of this prerogative was emphasized when, in the 1948 revision of the Criminal Code, four years after the *Johnson* decision, it altered the language of what is now 18 U. S. C. §3237, from that of the Judicial Code of 1911, ch. 231, §42, 36 Stat. 1100, "begun in one district and completed in another," by adding the words "or committed in more than one district." The return is basic to Federal income taxation. As stated in §601.602 of the Treasury Regulations, "All internal revenue taxes which are not collected by stamps are assessed and collected through the self-determination and self-application of the law and the regulations by taxpayers. The tax return forms are the instruments through which this is accomplished." The forms, prescribed in accordance with §6011 of the Internal Revenue Code of 1954, include a declaration by the preparer, if other than the taxpayer, under the penalties of perjury, that to the best of his knowledge the return is true, correct and complete based on all the information that he has.

The government's proof was that Gross sent incomplete and therefore untrue and incorrect information to the preparer in the Southern District; that the preparer thereupon prepared and attested returns in that district, which, while true on the basis of the information given him, were in fact false; and that he mailed them in the Southern District to Gross who then used them without change. This was enough to make the Southern District an "area through which force propelled by an offender operates." True no crime was "completed" in the Southern District. But it cannot be said the crime was neither "begun" nor "committed in part" there and was committed solely in a district where Gross and his wife simply signed and mailed the return and the Director received it.

Appendix B.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
United States Courthouse
Foley Square
New York 7

A. DANIEL FUSARO
Clerk

April 6, 1960

U. S. A.
vs.
HAROLD GROSS

Dear Sirs:

The Court has today handed down a decision in the above-entitled cause reversing and remanding the decision of the District Court.

Copies of opinions may be obtained from this office in accordance with Rule 18(5) of this Court.

Judgment has been entered today and a mandate will issue in accordance with Rule 28 of this Court.

Very truly yours,

A. DANIEL FUSARO
Clerk

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 8 1960
JAMES R. BROWNING, Clerk

No. 983

In the Supreme Court of the United States

OCTOBER TERM, 1959

HAROLD GROSS, A/K/A HARRY GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 983

HAROLD GROSS, A/K/A HARRY GROSS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, convicted on all counts of a six-count indictment alleging the wilfully attempted evasion of his individual income taxes for the years 1953 through 1958, contended on appeal, *inter alia*, that (1) venue should have been laid in the Eastern District of New York rather than the Southern District of New York; and (2) the trial court committed reversible error in compelling petitioner, during the trial, to answer certain questions put to him on cross-examination. The Second Circuit reversed the conviction on the second ground, and remanded the cause for a new trial. On the venue point, the court held that venue properly lay in the Southern District

of New York, where the indictment was returned and the first trial held. Petitioner seeks certiorari to review that portion of the Second Circuit's decision which relates to venue.

It would seem that the petition for certiorari is premature. The question of venue will be moot unless petitioner is retried and again convicted on the pending indictment, and in that event he could urge the point upon appeal from that conviction. In short, denial of certiorari at this stage would not close the door on petitioner's contention.

The venue argument is, moreover, without substance. The record shows that it was at the office of his accountant in the Southern District of New York that petitioner each year turned over the incomplete—and hence false—information relating to his income, and that it was this conduct on petitioner's part which resulted in the preparation (by the accountant) and the mailing (by petitioner) of the false and fraudulent tax returns understating his net income and tax liability in each of the six years. The proof thus substantiated what the indictment alleged, *viz.*, that one of the means of evasion employed by petitioner was that he had caused false and fraudulent tax returns to be prepared in the Southern District of New York. It is of no consequence that another aspect of the crime, the filing of the returns, involved the Eastern District of New York, where they were received and filed in the office of the Director of Internal Revenue. True, the crime was not completed in the Southern District, but the venue statute (18 U.S.C. 3237) provides that an offense "begun in one

district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Here, as the court below pointed out, it "cannot be said the crime was neither 'begun' nor 'committed in part'" in the Southern District (Pet. 12); hence it constituted one of the two districts in which venue properly lay. Cf. *United States* v. *Johnson*, 323 U.S. 273, 276; *United States* v. *Albanese*, 224 F. 2d 879 (C.A. 2), certiorari denied, 350 U.S. 845; *United States* v. *Miller*, 246 F. 2d 486 (C.A. 2), certiorari denied, 355 U.S. 905.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

JUNE 1960.

U.S. GOVERNMENT PRINTING OFFICE 1960